SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 783

D.C. TRANSIT SYSTEM, INC., *Petitioner*

v.

RICHARD A. WILLIAMS, ALFRED S. TRASK, DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA, LEONARD N. BEBCHICK, DANIEL W. GOTTLIEB AND WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT COMMISSION

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CONTENTS

Commission Position 2

Statement 2

Discussion 2

I. Rate-Making Formula 3

II. Court Substituted Itself for Commission 4

III. The Case Should Have Been Remanded for Further Findings and Conclusions 6

IV. The Court of Appeals' Review Jurisdiction Is Not Restricted by Section 6 of the Compact to Only Rates of Return in Excess of 6½% 7

Conclusion 10

TABLE OF AUTHORITIES

CASES CITED:

Area Rate Proceeding for Permian Basin, 88 S. Ct. 1344 (1968) 5, 8

D.C. Transit System v. WMATC, 121 U.S. App. D.C. 375, 350 F.2d 753 (1965) 8

Federal Power Commission v. Hope Nat. Gas Co., 320 U.S. 591 (1944) 5

Payne, et al. v. WMATC, D.C. Cir. No. 20,988 (1968) 4, 6

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 4

Universal Interpretive Shuttle Corp. v. WMATC, 89 S. Ct. 354 (1968) 2, 7

Williams, et al. v. WMATC, D.C. Cir. No. 20,200 (1968) ... 4, 5, 6

STATUTES CITED:

Transit's Congressional Franchise, Public Law 84-757, 70 Stat. 598 (1956)
Section 4 . . . . . 7, 8

Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960); 1 D.C. Code § 1410 (1961 ed.), Title II, Article XII
Section 6 . . . . . 7, 8
Section 17(a) 6

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D.C. Transit System, Inc. (Transit) has filed a petition for a Writ of Certiorari to the U. S. Court of Appeals for the District of Columbia Circuit to review the judgment of that court reversing two fare increase orders of the Respondent, Washington Metropolitan Area Transit Commission (Commission).

COMMISSION POSITION

The Commission has not itself sought review by Writ of Certiorari of the Court of Appeals' decision here in question because it does not believe that the questions involved are of sufficient importance to warrant review by the Supreme Court. See, *e.g.*, dissent in *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission*, 89 S. Ct. 354 (1968). Since D. C. Transit has brought the matter before the Court, however, the Commission believes it appropriate to indicate its views on the issues raised by the Petition.

STATEMENT

While the court's judgment touched many issues decided by the Commission in those two cases, Transit's petition raises only four substantive questions of error: first, that the court substituted a cost of capital formula in lieu of the operating ratio formula required by statute; second, that the court substituted its own findings in regard to the reasonableness of the permissible rate of return for those of the Commission; third, that the case should have been remanded to the Commission to enable it to develop additional evidence and/or make further findings; and fourth, that the court is precluded by law from disturbing a Commission order which authorizes a rate of return of less than 6½%.

The Commission concurs in the statement of the case recited in the Petition at pp. 3-8.

DISCUSSION

Our introductory remarks have emphasized that the Commission's role in this brief is neither to support nor oppose any of Transit's allegations, but to merely set forth the Commission's views on the salient issues raised by the petition. Hence, our remarks will be addressed to the issues outlined above.

I

Rate-Making Formula

Transit first argues that the Court of Appeals did not apply the operating ratio method of rate-making in its decision reversing the Commission. This failure, says Transit, creates a deviation in the law of sufficient importance to engage the attention of the Supreme Court. In the Commission's view, this is a misconstruction of the Court of Appeals' decision. The Court of Appeals' discussion of rate of return was not a substitution of the "cost of Capital" approach for the operating ratio approach. Rather, the court was spelling out some of the issues which should be taken into account in determining the proper level at which to set the return on gross operating revenues. Under the operating ratio method, the Commission must determine what operating expenses the company will incur in providing service. It must then set rates which will produce revenues sufficient to cover those operating expenses plus some margin over and above that amount. That margin, said the Court of Appeals, should not be determined in some abstract, unspecific manner. Rather, it should take into account an inquiry into such subjects as capital costs, capital programs, capital structure, and related subjects. Specifically, the court said:

> "We observed that the margin of return properly allowable over legitimate operating expenses is 'the sum of money needed to attract the capital, both debt and equity, required to insure financial stability and the resulting capacity of the utility to render the service upon which the public depends.' And we stressed the necessity for
>
> > 'inquiries and findings—judgmental as the latter may often be because ratemakers must be prophets of the future as well as historians of the past—into such things as the capital programs in prospect, what such programs entail in terms of down-payments as well as financing, the cost of borrowing money, working capital needs, the desirable ratio

> of debt to equity, the incentives required by a stockholder to keep his money in the business and the dividends and growth rates requisite to supply these incentives, the opportunities in these respects provided in comparable businesses, and the related matters which must be prayerfully explored by the conscientious regulator before he can begin to say why he fixed upon 4.87 rather than 6.5 or 3.2.'" *Williams, et al. v. WMATC*, D.C. Cir. No. 20,200, slip op. at pp. 6-7.

This was not a directive to substitute a cost of capital standard for the operating ratio method. It was merely an indication of the subjects into which the court thought inquiry was appropriate in setting a margin of return on the operating ratio theory of rate-making.

The Commission has, in subsequent cases, applied this approach to the operating ratio method and its decision has, in one instance, already been upheld by the Court of Appeals. *Payne, et al. v. WMATC*, D.C. Cir. No. 20,988, Oct. 8, 1968 (*aff'm* Order No. 684 [unreported], WMATC March 13, 1967).

Since the Commission does not agree that the Court of Appeals has rejected the operating ratio approach, but has merely explained the way in which it should be applied, it cannot agree with the arguments urged by Transit in Section I of its Petition.

II

Court Substituted Itself for Commission

The Commission is constrained to agree with Transit that the Court of Appeals improperly substituted its judgment for that of the Commission as to the permissible rate of return. It is a matter of established law that in reviewing Commission decisions, the court's function is to determine whether the Commission's action has a rational basis and is supported by substantial evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The action of the Court of

Appeals went far beyond that standard. The Court of Appeals' decision itself indicates that there was ample evidence underlying the Commission's determinations. See the court's elaborate discussion of the testimony of expert witnesses in Order No. 563 and in Order No. 564, at pp. 6-25 and pp. 83-95, respectively, in *Williams v. WMATC, supra.* A reading of that decision can lead only to the conclusion that evidence supporting the Commission's conclusions was not lacking. Rather, we can only conclude that the court felt that it would have decided the case differently. We must agree with Transit's position that this is an improper exercise of the court's review function.

Moreover, in practical terms the court has chosen to reverse the Commission on an issue which has little actual impact on the result. The court determined that an appropriate return was *$1,107,000* while the Commission would have allowed *$1,480,000.* The difference between the two is *$373,000.* However, the total revenues required to be produced through the rate structure amounted to *$30,420,638.* A difference of *$373,000* or 1.2% of gross revenues would have had very little impact upon the fare levels required.[1] "This court has . . . repeatedly stated that the Commission's orders may not be overturned if they produce 'no arbitrary results.' *Federal Power Commission v. Natural Gas Pipeline Co.,* 315 U.S. 575, at 586 (1942); *Federal Power Commission v. Hope Nat. Gas Co.,* 320 U.S. 591, at 602 (1944)." *Re Area Rate Proceeding for Permian Basin,* 88 S. Ct. 1344, at 1372 (1968). To reverse the Commission in these circumstances, with the complex effects of that reversal outlined in the court decision, is not, in the Commission's view, consistent with the proper exercise of the judicial review function.

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[1]The Commission authorized a change in the token rate only. Thus, the existing fare of tokens was 5 for $1.00 or 20¢ each. The new fare was 4 for 85¢ or 21¼¢ each. Therefore, the difference between the fare authorized and the fare necessary to produce the return the court would allow is approximately one half cent per token.

III

The Case Should Have Been Remanded for Further Findings and Conclusions

The Court of Appeals set aside the orders because the Commission did not make the "investigations and the resolutions essential to a legitimate exercise of its authority to prescribe just and reasonable fares." *Williams v. WMATC, supra,* slip op. at p. 27. Yet, it acknowledged that it did "not decide that the fares are unjust or unreasonable as a matter of law." Slip op. at p. 33.

This is precisely the posture of the Court of Appeals when it found Order No. 245 to be deficient. However in that instance, it remanded the case to the Commission for further findings. Consistency alone would seem to require corresponding treatment here. Moreover, this was not a case of a recalcitrant agency refusing to adhere to the jurisdiction of the court, for it explicitly rejected and disavowed any such motives. In fact, the Court of Appeals gave its approval to the Commission's rate of return treatment in a subsequent case. *Payne v. WMATC, supra,* D.C. Cir. No. 20,988.

While the Court of Appeals stressed that remand for agency determination of the proper rate of return could not be permitted because the Commission lacked jurisdiction to set fares for the past, its disposition of the case balances completely on the lower rate of return it accepted as the foundation for calculations to determine whether Transit had received excess profits.

If "investigations and resolutions" were lacking, the court should have followed the statutory language by remanding and instructing the Commission to take "additional evidence" and have the Commission "modify its findings as to the facts by reason of the additional evidence so taken. . . ." Article XII, Section 17(a) ("Judicial Review"), Compact.

In essence, its disclaimers to the contrary notwithstanding, the Court of Appeals did make "an independent determina-

tion" of the rate of return to be allowed Transit. This was error, for that is not its function. If the rate of return had to be re-determined, and it did under the court's disposition, then the court should not have engaged independently in such an exercise, but should have returned the case for the Commission to make that investigation and resolution.

IV

The Court of Appeals' Review Jurisdiction Is Not Restricted by Section 6 of the Compact to Only Rates of Return in Excess of 6½%

Transit's contention that Section 4[2] of its Franchise and Section 6[3] of the Compact prohibit the Court from disturbing any agency order permitting a rate of return of less than 6½% is clearly not in accord with the language of those provisions.

Transit correctly has pointed out that Section 6 of the Compact is merely a reaffirmation of Section 4 of the Franchise. The language is virtually identical and the legislative history of the Compact clearly indicates that its draftsmen intended to carry the import of Section 4 of the Franchise forward into the Compact.

Transit's contention rests primarily upon a dictum in the opinion of this Court in *Universal Interpretive Shuttle Corporation v. WMATC, supra,* at p. 357. There, in comparing the statutory powers of the Secretary of the Interior and of the Commission, this Court noted that the Commission would have the power to suspend any fare of a carrier subject to its jurisdiction and that it could set whatever fare it found reasonable. Following this declaration, this Court then stated that nevertheless, "a profit of 6½% could not be prohibited."

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[2]Pub. L. 84-757, Tit. I, pt. 1, c. 669, § 1(a), 70 Stat. 598 (1956).

[3]Pub. L. 86-794, 74 Stat. 103 (1960).

That dictum is imprecise, but even if it were not, it cannot be considered to be controlling. The construction of Section 6 of the Compact was not even obliquely at issue in *Universal*. "This court does not decide important questions of law by cursory dicta concerned in unrelated cases." *Re Area Rate Proceeding for Permian Basin, supra,* 88 S. Ct. at 1364. Nevertheless, Transit has seized upon this dictum to insert a new issue in this case at this late date.

The striking facet about Transit's contention is that the prohibition would run against a reviewing court, but not against the Commission. It must be remembered that it is the Commission's function to establish a rate of return, not that of a reviewing court. It is the function of the latter merely to determine whether the rate of return found by the Commission to be proper is legally sound and resting upon substantial evidence. Transit makes no claim here that the Commission could not properly set a rate of return at less than 6½%. Its argument assumes only that a reviewing court cannot disturb any order of the Commission permitting a return of less than 6½%. Thus, review of this important element of a rate case would be precluded unless the Commission authorized a rate of return which would exceed 6½%. This is indeed a strange construction of a statutory provision which is designed primarily as a guideline for the Commission—not a reviewing court.

Finally, in a decision not appealed by Transit, the Court of Appeals three years ago specifically found that the 6½% proviso was not a "floor" or guarantee. *D.C. Transit System v. WMATC,* 121 U.S. App. D.C. 375, 350 F.2d 753 (1965). After a thorough analysis of the statutory language and the underlying legislative history, the Court of Appeals concluded that neither Section 4 of the Franchise nor Section 6 of the Compact guarantees Transit a minimum of 6½% on Transit's gross operating revenues. The court's reasoning is persuasive:

> "The Commission, by virtue of Section 6(a)(3) of the Compact, is obligated to set for the carriers over

> which it has jurisdiction 'just and reasonable fares'—a standard which has invariably imposed an obligation to balance the interests of both the utility and the consumers. In this setting, the deceptively specific language of Section 4 and Section 6(a)(4) should not be read as depriving the Commission of that discretion which is a customary, and necessary, element of rate-making. We think Congress used the figure of 6.5 per cent simply to suggest a general objective of this regulatory scheme—to allow Transit a higher return than its predecessor had received. It clearly seems to have intended that the rate-making authority should look to other criteria as well. Certainly this was the understanding, and the practice, of the PUC, as it was, in this case, of the Washington Metropolitan Area Transit Commission. The former consistently took the position that it possessed authority to set Transit's rates at whatever level it found to be 'just and reasonable'—high enough to insure that the company's capital requirements would be met, and low enough to enable it to continue to attract and retain patrons. On three different occasions the Commission found this level to be below what Transit now claims is the statutory minimum. Both the PUC's position and its performance were matters of public record, and well known to Congress, when the Compact was enacted with the purpose of continuing the rate-making formula already in use. Congress was similarly and explicitly aware of the PUC's interpretation when it adopted the school fare subsidy provision in 1962, but only after deleting the reference to a specific rate of return. We find this history compelling evidence of how Congress intended the rate provisions of the Franchise Act and the Compact were to operate." [Footnotes omitted.]

Of course, in that case, Transit was contesting the power of the Commission to establish a return below 6½%, as contra-distinguished from its argument here that the Court of Appeals is precluded from disturbing any return of less

than 6½%. Nothing in the statutes confers so rigid a constriction upon the review power of the Court of Appeals.

CONCLUSION

While the Commission has disclaimed any intent to seek review of the opinion of the Court of Appeals, it believes that that opinion was correct in its application of the operating ratio formula and that the court does have review powers over orders of the Commission allowing rates of return of less than 6½%. On the other hand, the Commission concurs with Transit that the Court of Appeals improperly assumed functions of the Commission and erred procedurally by failing to remand the case for further rate of return determinations by the Commission.

Respectfully submitted,

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